

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

FRED A. ROSEN and MARIAN ROSEN;  
HOUSTON FEDERATION OF TEACHERS,  
on behalf of its members; ANNIE M. BANKS;  
LARRY D. BARNETT; ROBERT CHAZEN;  
CLIFFORD D. GOOKIN, Trustee for the  
Clifford D. Gookin Revocable Living Trust;  
CARL HERRIN; TODD L. JOHNSON,  
Administrator for RJS & Affiliated Companies  
Pension Plan; DAVID H. LOWE; ROBIN SAEX;  
JOHN SIEMER and ELIZABETH SIEMER,  
Trustees FBO The Siemer Family Trust;  
ANTHONY G. TOBIN; and JOHN E. WILLIAMS,

Plaintiffs,

v.

ANDREW S. FASTOW; KENNETH L. LAY;  
JEFFREY J. SKILLING; ROBERT A.  
BELFER; NORMAN P. BLAKE, JR.;  
RICHARD B. BUY; RICHARD CAUSEY;  
RONNIE C. CHAN; JOHN H. DUNCAN;  
JOE H. FOY; WENDY L. GRAMM; KEN L.  
HARRISON; ROBERT K. JAEDICKE;  
MICHAEL J. KOPPER; CHARLES A.  
LEMAISTRE; REBECCA  
MARK-JUSBASCHE; JOHN MENDELSON;  
JEROME J. MEYER; LOU PAI; PAUL V.  
FERRAZ PEREIRA; FRANK SAVAGE;  
JOHN A. URQUHART; JOHN WAKEHAM;  
CHARLES E. WALKER; BRUCE WILLISON;  
HERBERT S. WINOKUR, JR.; BEN GLISAN;  
KRISTINA MORDAUNT; D. STEPHEN  
GODDARD, JR.; DAVID B. DUNCAN;  
DEBRA A. CASH; ROGER WILLARD;  
THOMAS H. BAUER; and  
ARTHUR ANDERSEN, L.L.P.,

Defendants.

United States Courts  
Southern District of Texas  
FILED

JAN 30 2002 I I

Michael M. Milby, Clerk

CIVIL ACTION NO. H-01-3624  
AND CONSOLIDATED CASES

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION TO REMAND**

275

TO THE HONORABLE COURT:

Plaintiffs Fred A. Rosen and Marian Rosen; Houston Federation of Teachers, on behalf of its members; Annie M. Banks; Larry D. Barnett; Robert Chazen; Clifford D. Gookin, Trustee for the Clifford D. Gookin Revocable Living Trust; Carl Herrin; Todd L. Johnson, Administrator of RJS & Affiliated Companies Pension Plan; David H. Lowe; Robin Saex; John Siemer and Elizabeth Siemer, Trustees FBO The Siemer Family Trust; Anthony G. Tobin; and John E. Williams, file this memorandum in support of their motion to remand the present action to the 333rd Judicial District Court of Harris County, Texas.

In support of remand, Plaintiffs show the Court the following:

#### **I. INTRODUCTION**

In early November 2000, Plaintiffs Fred A. Rosen and Marian Rosen filed a derivative action in the 333rd Judicial District Court of Harris County, Texas, against nominal Defendant Enron and a number of individual Defendants. On December 4, 2001, two days after Enron declared bankruptcy, the company was nonsuited.

On January 16, 2002, an amended petition was filed in which Arthur Andersen, L.L.P (Andersen) was joined as a party Defendant, along with several other individual Defendants. Additional Plaintiffs were also added, among them the Houston Federation of Teachers, on behalf of its members (HFT).

On the same day Plaintiffs sought a temporary restraining order against Andersen, to prevent it from destroying documents. Hon. Caroline Baker granted the TRO after hearings on January 16 and 17, 2002. Immediately following the TRO entered against it, Andersen removed the action to this Court.

It premised removal solely on the Securities Litigation Uniform Standards Act (SLUSA), a statute governing certain types of securities class actions. For removal to be proper, however, Andersen must meet all SLUSA statutory elements, including the threshold requirement that the present case be a “covered class action” as defined by SLUSA. It cannot do so under the plain language of the statute and standards of review applied to removal cases. Because removal was improper the Court lacks subject matter jurisdiction. It should remand the action.

## II. ARGUMENT

### A. Andersen does not Meet Removal Standards

Because federal courts are courts of limited jurisdiction, removal is proper only for cases that could have originally been brought in federal court. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Therefore, any doubts must be construed against removal. *See, e.g., Willy v Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988), *aff'd*, 503 U.S. 131 (1992); *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir 1979).

A case will arise under federal law under two situations: first, if the complaint establishes that federal law creates the cause of action; or, second, if the right to relief necessarily depends on the resolution of substantial questions of federal law. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983). Plaintiffs are the masters of their complaints. Therefore, “[a] determination that a cause of action presents a federal question depends on the allegations of the plaintiffs’ well-pleaded complaint.” *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).

In short, although a defendant has a right to remove from state court any action over which the federal court would have had original jurisdiction, it bears a heavy burden of establishing the



jurisdictional prerequisites. *See, e.g., Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921-22 (5th Cir. 1997), *modified*, 1997 U.S. App. LEXIS 36785 (5th Cir Dec. 19, 1997); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d at 365; *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), *cert. denied*, 510 U.S. 868 (1993); *Asociacion Nacional de Pescadores v. Dow Quimica de Colombia, S.A.*, 988 F.2d 559, 563 (5th Cir. 1993). As shown below, Andersen cannot meet its burden of showing jurisdiction in this Court. The case should be remanded.

**B. Andersen does not Satisfy SLUSA's Requirements for Removal**

**1. The Securities Litigation Uniform Standards Act (SLUSA)**

The Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (PSLRA), was enacted in 1995. The PSLRA was passed to “provide uniform standards for class actions and other suits alleging fraud in the securities market.” *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001). The 1995 act was designed to discourage frivolous litigation such as strike suits by heightening federal pleading requirements nationwide.

As a consequence, therefore, securities class actions began to be brought in state courts. *Id.*

Three years later, Congress passed the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (SLUSA). The purpose of SLUSA was to curtail the filing of some—but not all—securities class actions in state courts. Therefore, certain securities cases are removable when they do not meet SLUSA's requirements. *See, e.g., Gutierrez v. DeLoitte & Touche, L.L.P.*, 147 F.Supp. 2d 584, 589 (W.D. Tex. 2001) (remanding case brought under SLUSA); *Shaev v. Claflin*, 2001 WL 548567 at \*3 (N.D. Cal. May 17, 2001) (same under SLUSA); *Burns v. Prudential Secs.*, 116 F.Supp. 2d 917, 920-21 (N.D. Ohio 2000) (same).

An action brought by a private party will be removed and is subject to dismissal under SLUSA if a defendant is able to prove the following:

1. The action is a “covered class action” under SLUSA;
2. the action purports to be based upon state law;
3. the action involves a “covered security” under SLUSA;
4. the defendant is alleged to have misrepresented or omitted a material fact;  
and
5. the alleged misrepresentation or omission was made “in connection with”  
the purchase or sale of the covered security.

15 U.S.C. §§ 77p, 78bb (f)(1-2).

Certain other provisions of SLUSA are relevant to this action. First, the act defines the term “covered class action” in part as a single lawsuit “in which . . . damages are sought on behalf of more than 50 persons . . .” 15 U.S.C. §§ 77p (f)(2)(A)(i). For plaintiffs to reach the fifty-person “covered class action” threshold, the statute provides further that all “persons” or “prospective class members” must be counted. And SLUSA provides specific parameters for “counting”:

(C) Counting of certain members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership or other entity, shall be treated as one person or a prospective class member, but only if the entity is not established for the purpose of participating in the action.

15 U.S.C. §77 p(f)(2)(C).

**2. The Present Action is not a “Covered Class Action”**

Defendant Andersen removed this action based solely on SLUSA. It maintains that all SLUSA requirements are met. According to Andersen, the present case qualifies as a covered class action, concerns a covered security, cannot be maintained under Texas law, and involves

Andersen's misrepresentations or omissions of material facts that affected the purchase or sale of Enron stock. See notice of removal at 4 ¶¶ 13-15. Andersen is wrong, however.

Removal is improper because it cannot satisfy SLUSA's threshold element: this action is not a "covered class action."<sup>1</sup>

Andersen contends, citing paragraph 51 of the petition, that "Plaintiffs seek to represent and to seek damages on behalf of the unnamed members of the Houston Federation of Teachers, a group clearly totaling more than fifty." *Id.* ¶ 14. But the plain wording of the statute destroys Andersen's argument. In counting class members for purposes of meeting the fifty-person requirement, SLUSA mandates that "A **corporation**, investment company, pension plan" and certain other entities are to be treated as one person. (emphasis supplied). And, although Andersen neglects to inform the Court of the fact, HFT is a corporation. Paragraph 3 of the amended petition states the following:

Plaintiff **Houston Federation of Teachers** ("HFT") is organized as a nonprofit **corporation** and files on behalf of its members who are teachers in the State of Texas. The organization also includes retired teachers. HFT's members have contributed to the Teacher Retirement System of Texas ("TRS") from their salaries.<sup>2</sup>

(emphasis in original and supplied). Therefore, given the plain wording of the statute, this action must be remanded.

But even assuming for the sake of argument that the Houston Federation of Teachers were not a corporation, the action nonetheless does not fall within the purview of SLUSA. As paragraph 3 of the amended petition avers in part, the Houston Federation of Teachers

---

<sup>1</sup> Because SLUSA's first removal element is not met, Plaintiffs do not address the others.

<sup>2</sup> Andersen does not allege, nor could it, that the HFT was "established for the purposes of participating in the action," a situation that would exclude it as being counted as one person. See 15 U.S.C. § 77p(f)(2)(C).



contributes to the Teacher Retirement System of Texas (TRS) from teacher salaries. In later paragraphs the pleading goes on to state, with respect to the Teacher Retirement System that:

49. TRS is organized under the provisions of Sections 821.001, *et seq.*, of the Government Code and under the provisions of Article 16, Section 67 of the Texas Constitution. It is available to persons employed by the public schools of the State of Texas and persons employed by an institution of higher education in the State of Texas.
50. Contributions are made by the employees and also by the State to create the retirement fund. The fund is managed by a Board of Trustees appointed by the Governor in odd-numbered years.

\* \* \*

The Board controls the assets and investments of TRS. The State Comptroller is the custodian of the assets and cash of TRS.

51. Plaintiffs' members include both working teachers and retired teachers. These teachers and retired teachers have regularly contributed to TRS. TRS is one of the largest teacher retirement systems in the United States.

\* \* \*

TRS invests its funds to pay retirees their benefits now and in the future.

As it does with respect to a corporation, SLUSA also counts a "pension plan" as one person. *See* 15 U.S.C. § 77 p(f)(2)(C). A review of the amended pleading's allegations can lead only to the conclusion that the Houston Federation of Teachers functions as a pension plan for teachers and retired teachers, *i.e.*, "its members." As the petition alleges, teachers belonging to HFT contribute to the Teacher Retirement System. And, as the pleading also explains, TRS is a retirement fund whose assets and investments are managed by a board appointed by the Governor of Texas. TRS invests the plan's funds for the benefit of present and future retired teachers.

In determining federal jurisdiction, this Court must look to the substance of a complaint, rather than to its form or labels assigned within the pleading. *See, e.g., Humphrey v. Moore*, 375

U.S. 335, 352 (1964) (Goldberg, J., concurring) (“[S]ubstance and not form must govern. . .”); *In re Carter*, 618 F.2d 1093, 1100-1101 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981); *Smith v. Local No. 25*, 500 F.2d 741, 749 n. 6 (5th Cir. 1974). The substance of the petition at issue here establishes that, despite the label assigned to it, the Houston Federation of Teachers is a pension plan.

For that reason as well, therefore, the removal of this action is improper. Because subject matter jurisdiction is lacking, the Court should order the case remanded.

### III. CONCLUSION

For all reasons above, this Court lacks subject matter jurisdiction under the Securities Litigation Uniform Standards Act. Therefore, it should order the action remanded to the 333rd Judicial District Court of Harris County, Texas, where it was filed originally.



Respectfully submitted,

**MARIAN ROSEN & ASSOCIATES**

Marian S. Rosen  
State Bar No. 17263000  
1330 Post Oak Boulevard, Suite 2910  
Houston, Texas 77251  
Telephone (713) 222-6464  
Fax (713) 227-4703

**HOWARD M. RUBENSTEIN**

Attorney at Law  
State Bar No. 17361900  
1330 Post Oak Boulevard, Suite 2905  
Houston, Texas 77056  
Telephone (713) 965-0206  
Fax (713) 961-5745

**FLEMING & ASSOCIATES, L.L.P.**

G. Sean Jez  
State Bar No. 00796829  
George M. Fleming  
State Bar No. 07123000  
1330 Post Oak Boulevard, Suite 3030  
Houston, Texas 77056-3019  
Telephone (713) 621-7944  
Fax (713) 621-9638

By: \_\_\_\_\_

G. Sean Jez

**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify a true and correct copy of the above and foregoing has been provided to  
all parties as indicated below on this the \_\_\_\_\_ day of January , 2002:

**Via Facsimile**

Richard J. Zook/Thomas A. Cunningham	713-255-5555
Ira M. Press	212-751-2540
R. Paul Yetter	713-238-2002
Charles R. Parker	713-868-1275
Thomas W. Sankey	713-223-7737
William B. Federman	405-239-2112
Michael D. Sydow/Ronald J. Kormanik	713-752-2119
Jack E. McGehee/James V. Pianelli/Timothy D. Riley	713-868-9393
Thomas E. Bilek	713-227-9404
William S. Lerach	619-231-7423
Joseph Albert McDermott, III	713-527-9633
Roger B. Greenberg	713-752-0327
Saul Roffe	212-425-9093
Sean F. Greenwood	713-650-1400
John G. Emerson, Jr.	281-488-8867
Richard M. Frankel	713-528-2509
James D. Baskin	512-322-9280
Steven E. Cauley/Paul J. Geller	561-750-3364
Steven D. Susman/Kenneth S. Marks	713-654-3381
Richard B. Drubel	603-643-9010
Rusty Hardin/Andrew Ramzel	713-652-9800
Jack C. Nickens/Paul D. Glack	713-654-7690
J. Clifford Gunter, III	713-221-1212
Robin C. Gibbs	713-750-0903
Robin L. Harrison	713-752-2330

  
\_\_\_\_\_  
G. SEAN JEZ